

FEDERAL COURT OF AUSTRALIA

Su v Minister for Immigration and Multicultural and Indigenous Affairs

[2005] FCA 1176

MIGRATION – Application for an Other Family (Migrant) (Class BO) Subclass 115 (Remaining Relative) visa – remaining relative must have no more than three overseas near relatives – where relatives of a spouse can be counted – appellant divorced – whether Migration Review Tribunal erred in not considering whether appellant and her ex-husband were in a de facto relationship under reg 1.15A of the *Migration Regulations 1994*

Migration Regulations 1994 reg 1.15, 1.15A

**GUI QIN SU AND SHAO QIN SU v MINISTER FOR IMMIGRATION AND
MULTICULTURAL AND INDIGENOUS AFFAIRS
NSD 413 OF 2005**

**MOORE J
30 AUGUST 2005**

SYDNEY

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD 413 OF 2005

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: GUI QIN SU
 FIRST APPELLANT**

**SHAO QIN SU
 SECOND APPELLANT**

**AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
 AND INDIGENOUS AFFAIRS
 RESPONDENT**

JUDGE: MOORE J

DATE OF ORDER: 30 AUGUST 2005

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellants pay the respondent's costs.

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD 413 OF 2005

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: GUI QIN SU
 FIRST APPELLANT**

**SHAO QIN SU
SECOND APPELLANT**

**AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
 AND INDIGENOUS AFFAIRS
 RESPONDENT**

JUDGE: MOORE J

DATE: 30 AUGUST 2005

PLACE: SYDNEY

REASONS FOR JUDGMENT

- 1 This is an appeal from a judgment of Federal Magistrate Barnes of 24 February 2005. On 27 July 2000 the second appellant ("the appellant") applied for an Other Family (Migrant) (Class BO) subclass 115 (Remaining Relative) visa. A delegate of the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister") refused to grant the visa on 16 November 2002. On 2 December 2003 the first appellant (the appellant's father) applied to the Migration Review Tribunal ("the Tribunal") for review of the decision and on 26 March 2004 the Tribunal affirmed the decision of the delegate. The appellant sought judicial review of the decision of the Tribunal on 21 April 2004 in the Federal Magistrates Court. On 24 February 2005 the Federal Magistrate dismissed the application for judicial review. It is from that judgment that the appellant now appeals.

Background facts

- 2 The appellant applied for an Other Family (Migrant) (Class BO) visa on the basis that, amongst other things, she satisfied the "remaining relative" criteria under reg 1.15 of the Migration Regulations 1994 ("the Regulations"). The appellant included her young daughter

in the application but it is unnecessary to refer to the daughter's position in these reasons. The appellant was sponsored by her father who is an Australian citizen. It was necessary for the appellant to demonstrate that she was a remaining relative of her father. A relevant question was whether the appellant was in a spousal relationship at the time she applied for the visa, as a person was a remaining relative only if, amongst other things, the person and their spouse (if any) together had not more than three overseas near relatives. The person with whom the appellant may have had a spousal relationship was a person she had married in 1990.

- 3 The appellant provided a number of notarial certificates in support of the claim that she had divorced her husband on 18 April 2000. As noted earlier, the application for the visa was made on 27 July 2000. The appellant claimed she lived alone with her daughter. Officers of the Department of Immigration and Multicultural and Indigenous Affairs conducted a home visit to her primary place of residence and interviewed her. It is convenient at this point to set out the description of the visit by the Tribunal (at [18] of the Tribunal's reasons for decision and following):

During the course of the interview a man arrived at the residence and gave his name as Wu Sheng. He claimed to be friend of the primary visa applicant. He departed almost immediately.

The primary visa applicant claimed that the man was her cousin, He Shao Rong, and that his mother lived in the house as well and helped look after the primary visa applicant's daughter. She claimed that he often ate meals with them. Departmental officers took note of the fact that the name given by the man was different to that given by the primary visa applicant.

Departmental officers also noted that there were items of men's clothing, shoes and personal items in the master bedroom, which the primary visa applicant claimed to belong to her cousin, He Shao Rong. When questioned again about who resided in the house the primary visa applicant claimed her auntie, her daughter and herself lived there and that sometimes He Shao Rong came to visit and stayed the night (up to 4 times a week depending on his work schedule).

The Primary visa applicant also added that her cousin was married and that sometimes his wife stayed at the house as well. The primary visa applicant could not give a name of the wife of the cousin, stating she only called her sister-in-law.

The Departmental officers noted a man's wallet in the master bedroom, which the primary visa applicant claimed belonged to her. Inside the wallet was a picture of He Shao Rong, the primary visa applicant, the secondary applicant and another young child.

On a further tour of the premises the Departmental officers noted that the primary visa applicant offered differing explanations about who stayed in each room, and also claimed that her cousin and his wife occupied the master

bedroom.

On completing the interview the Departmental officers spoke to a group of ladies outside the building. Upon showing a photo of the primary visa applicant and the secondary applicant to the group, one of the women said to another "that is your daughter-in-law". The Departmental officers noted that the woman who was spoken to, cut the conversation short and prevented the other women from speaking.

- 4 The appellant later explained that her cousin was also known as Hong Sheng, that the photo was of her, him, her daughter and his daughter. In support, she provided an Identification Card for He Shao Rong, a statement from him that he stays at her house and a certificate stating that He Shao Rong had assumed the name of He Hong Sheng.

The Tribunal's reasons for decision

- 5 The appellant's father, the review applicant, gave evidence at the hearing before the Tribunal. This was to the same effect as the appellant's explanations regarding her cousin He Hong Sheng. Her father also explained that it was his house the appellant lived in with his sister and grand-daughter. His sister stayed there to care for the grand-daughter and the nephew also lived there if he had to work in town. He said that at the time of the field visit his daughter, grand-daughter, sister, nephew and nephew's wife were living in the house. He explained his daughter's mother-in-law lived close by and always picked up the appellant's daughter from school if the appellant was not free.

- 6 The Tribunal noted that:

One inconsistency is the claim that his sister (the aunt of the primary visa applicant) resided with the primary visa applicant so as to care for his grandchild. If this was so, then why would the (ex)mother-in-law of the primary visa applicant also be required to care for the child?

The Tribunal thought the review applicant's explanation as to why the cousin had told the field officer he was a friend and not a cousin and why the name given by the cousin (Wu Sheng) did not correspond to the name now claimed (He Hong Sheng). The Tribunal also noted that the appellant did not know her cousin's wife's name.

- 7 The Tribunal did not address directly the question of whether the appellant and her husband had divorced. The Tribunal gave the notarial certificates little weight noting country information that notarial certificates were at best secondary evidence of the events they

purported to document and could be based on primary evidence, secondary evidence, testimony of a person or persons or investigation by the notary. The Tribunal concluded the appellant continued to be in a spousal relationship at the time the visa application was made and, as a consequence, had four overseas near relatives (her spouse's parents and siblings living in China). Based on those findings, the Tribunal determined the appellant did not satisfy the criteria for an Other Family (Migrant) (Class BO) visa and affirmed the decision of the delegate.

Judgment of the Federal Magistrate

- 8 The Federal Magistrate approached the matter on the basis that the Tribunal did find that the appellant and her husband had been divorced and that approach is not challenged in this appeal. Before the Federal Magistrate, the appellant submitted the finding that she had been divorced from her husband was unavoidable because the Tribunal did not reject the documents provided by her stating she was divorced from her husband. As a result, she was not married and the Tribunal was required to determine whether she had a spouse by reference to the de facto relationship limb of the definition of "spouse" contained in reg 1.15A(2). This required the Tribunal to determine, amongst others things, whether she and her ex-husband had a mutual commitment to share a life as husband and wife to the exclusion of all others. It was submitted on the appellant's behalf that the Tribunal erred in not applying that test when determining whether she was in a spousal relationship.
- 9 While the Federal Magistrate noted the Tribunal did not make any express findings as to whether the appellant was in fact divorced and did not refer to the definition of "spouse" in reg 1.15A in its reasons for decision, her Honour considered the Tribunal did not address the wrong question. The Federal Magistrate noted the Tribunal was required to determine whether the appellant had satisfied it that a pre-existing relationship had ceased, taking into account not only documentary evidence but also independent evidence and evidence such as that of the field visit. The Tribunal found that the appellant was still a spouse of her ex-husband and did not accept the spousal relationship had ceased to exist, despite the divorce, that is, there was still a mutual commitment, a genuine and continuing relationship and they lived together. Her Honour considered the Tribunal was not under an obligation to refer expressly to the text of reg 1.15A.

10 The Federal Magistrate rejected a submission by the appellant that the Tribunal failed to consider various documents and relevant material that were significant, credible and up-to-date and that the Tribunal was bound to take into account. Her Honour considered that, on a fair reading of the Tribunal's reasons for decision as a whole, the Tribunal recognised and addressed the underlying claims represented by the particular documents the appellant claimed had not been considered by the Tribunal. Her Honour found that in this instance the Tribunal was required to determine whether the appellant had satisfied it that the appellant was no longer in a spousal relationship. Her Honour considered that the Tribunal had considered all of the integers of the appellant's claims and had not failed to take into account relevant considerations in a manner constituting jurisdictional error.

The appeal and its disposition

11 In this appeal only one ground was pressed. It was that:

Her Honour erred in finding that the Tribunal did not ask the wrong question, and did not exceed or fail to exercise its jurisdiction, when the Tribunal found that it "did not accept that the spousal relationship of the primary visa applicant had ceased at the time of application", whilst accepting that the parties were divorced.

Particulars

Her Honour should have found, as the Court found in Tran v MIMIA [[1998] 290 FCA], that the Tribunal should have considered whether or not the Second Applicant and her ex-husband met the definition of "de facto spouse" prescribed under the Migration Regulations (1.15 A), and that the Tribunal's failure was an error going to jurisdiction.

12 It is convenient, at this point, to set out regs 1.15 and 1.15A of the Regulations as they applied at the time the decision concerning the appellant was made.

1.15 Remaining relative

(1) *An applicant for a visa is a **remaining relative** of another person who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen if the applicant satisfies the Minister that:*

- (a) *the other person is a parent, brother, sister, step-parent, step-brother or step-sister of the applicant; and*
- (b) *the other person is usually resident in Australia; and*
- (c) *if the applicant or the applicant's spouse (if any) has an overseas near relative:*

- (i) *the applicant and the applicant's spouse (if any) usually reside in a country, not being Australia, that is different to the country in which that relative resides; and*
 - (ii) *neither the applicant nor the applicant's spouse (if any) have had contact with that relative within a reasonable period before making the application; and*
- (d) *the applicant and the applicant's spouse (if any) together have not more than 3 overseas near relatives; and*
- (e) *...*
- (2) *In this regulation:*
 - overseas near relative**, *in relation to an applicant, means a person who is:*
 - (a) *a parent, brother, sister, step-parent, step-brother or step-sister of the applicant or of the applicant's spouse (if any); or*
 - (b) *a child (including a step-child) of the applicant or of the applicant's spouse (if any), being a child who:*
 - (i) *has turned 18 and is not a dependent child of the applicant or of the applicant's spouse (if any); or*
 - (ii) *has not turned 18 and is not wholly or substantially in the daily care and control of the applicant or of the applicant's spouse (if any) —*
other than a relative of that kind who:
 - (c) *is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; and*
 - (d) *is usually resident in Australia.*
- (3) *For the purposes of paragraphs (1) (c) and (d), an overseas near relative is taken to reside in his or her last known country of residence unless the applicant satisfies the Minister that the relative resides in another country.*

1.15AA Carer ...

1.15A Spouse

- (1) *For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:*
 - (a) *in a married relationship, as described in subregulation (1A); or*
 - (b) *in a de facto relationship, as described in subregulation (2).*
- (1A) *Persons are in a married relationship if:*
 - (a) *they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
 - (b) *the Minister is satisfied that:*
 - (i) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*

- (ii) *the relationship between them is genuine and continuing; and*
 - (iii) *they:*
 - (A) *live together; or*
 - (B) *do not live separately and apart on a permanent basis.*
- (2) *Persons are in a de facto relationship if:*
 - (a) *they:*
 - (i) *are of opposite sexes; and*
 - (ii) *are not married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
 - (iii) *are not within a relationship that is a prohibited relationship for the purposes of subsection 23B (2) of the Marriage Act 1961; and*
 - (b) *they are of full age, that is:*
 - (i) *if either of the persons is domiciled in Australia — both of them have turned 18; or*
 - (ii) *if neither of the persons is domiciled in Australia — both of them have turned 16; and*
 - (c) *the Minister is satisfied that:*
 - (i) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) *the relationship between them is genuine and continuing; and*
 - (iii) *they:*
 - (A) *live together; or*
 - (B) *do not live separately and apart on a permanent basis; and*
 - (d) *subject to paragraph (e) and subregulation (2A), where either of them is an applicant for a permanent visa, a Student (Temporary) (Class TU) visa, a Partner (Provisional) (Class UF) visa, or a Partner (Temporary) (Class UK) visa — the Minister is satisfied that, for the period of 12 months immediately preceding the date of application of the party relying on the existence of the relationship:*
 - (i) *they had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) *the relationship between them was genuine and continuing; and*
 - (iii) *they had:*
 - (A) *been living together; or*
 - (B) *not been living separately and apart on a permanent basis; and*
 - (e) ...
- (2A) *Paragraph 2 (d) does not apply if:*
 - (a) *the applicant is applying as:*

- (i) *the spouse of a person who:*
 - (A) *is, or was, the holder of a permanent humanitarian visa; and*
 - (B) *before that permanent humanitarian visa was granted, was in a relationship with the applicant that satisfies the requirements of subparagraphs (2) (c) (i), (ii) and (iii) and of which Immigration was informed before the visa was granted; or*
 - (ii) *a member of the family unit of a person who is an applicant for a permanent humanitarian visa; or*
 - (b) *the applicant can establish compelling and compassionate circumstances for the grant of the visa.*
- (3) *In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:*
- (ab) a Special Eligibility (Residence) (Class AO) visa; or*
 - (ad) a Partner (Migrant) (Class BC) visa; or*
 - (ae) a Partner (Provisional) (Class UF) visa; or*
 - (af) a Partner (Residence) (Class BS) visa; or*
 - (ag) a Partner (Temporary) (Class UK) visa;*
- the Minister must have regard to all of the circumstances of the relationship, including, in particular:*
- (a) the financial aspects of the relationship, including:*
 - (i) any joint ownership of real estate or other major assets; and*
 - (ii) any joint liabilities; and*
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
 - (iv) whether one party to the relationship owes any legal obligation in respect of the other; and*
 - (v) the basis of any sharing of day-to-day household expenses;*
 - (b) the nature of the household, including:*
 - (i) any joint responsibility for care and support of children, if any; and*
 - (ii) the parties' living arrangements; and*
 - (iii) any sharing of responsibility for housework;*
 - (c) the social aspects of the relationship, including:*
 - (i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;*
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) any basis on which the persons plan and undertake joint social activities;*
 - (d) the nature of the persons' commitment to each other,*

including:

- (i) the duration of the relationship; and*
 - (ii) the length of time during which the persons have lived together; and*
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) whether the persons see the relationship as a long-term one.*
- (4) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for a visa of a class other than a class specified in paragraph (3) (ab), (ad), (ae), (af) or (ag), the Minister may have regard to any of the factors set out in subregulation (3).*
- (5) If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.*

For present purposes the material parts of the Regulations are reg 1.15(1)(d) and reg 1.15A(2)(c). The former requires an applicant to satisfy the Minister that the applicant and the applicant's spouse (if any) together have not more than three overseas near relatives. The latter provides that persons are in a de facto relationship if, amongst other requirements, the Minister is satisfied that the relationship has the characteristics identified in pars (i) and (ii) and the people live in one of the two ways identified in par (iii).

13 The gravamen of the argument of the appellant was that having regard to the judgment of Carr J in *Tran v Minister for Immigration and Multicultural Affairs* [1998] FCA 290 ("*Tran*"), the Tribunal was required to consider whether the relationship between the appellant and her former husband had the characteristics identified in pars (i) and (ii) of reg 1.15A(2)(c) and whether they lived in one of the two ways identified in par (iii), and it failed to do so. The gravamen of the argument of counsel for the Minister was that *Tran* was distinguishable both on the facts and the applicable law (because the regulations did not then, but now do, impose upon an applicant the evidentiary burden of satisfying the Minister that they were a remaining relative) and, having regard to the way the applicant advanced her application, it was not necessary for the Tribunal to address all matters in reg 1.15A(2)(c).

14 The judgment of *Tran* concerned a situation which was broadly analogous to the present as it involved a question about whether a couple were in a de facto relationship notwithstanding that they had been divorced. The factual case that was advanced by the applicant in that matter was, for purposes relevant to this appeal, conveniently summarised in the following

paragraph of Carr J's reasons:

The IRT held a hearing in Melbourne on 11 September 1997 during which evidence was taken from the applicant and her son. They were accompanied by their legal adviser (a registered migration agent) and an interpreter. Both the applicant and her son gave evidence. The applicant stated that she lived with her daughter, Ms Ton, in Vietnam until her (the applicant's) departure for Australia in 1995. She said that her son-in-law would stay with them sometimes or "rarely". He went out drinking during the day but would stay at night. This had continued until the divorce in 1995, before the applicant came to Australia. She stated that her son-in-law visited the applicant occasionally, mainly to see his son every 3-5 days. The applicant's son (Ms Ton's brother - Mr Thien) also gave evidence. Mr Thien came to Australia in 1993 but had returned to Vietnam in early 1995 and in March 1997. Mr Thien said that he stayed for a month in Vietnam on the first occasion. He said that his sister and her husband were no longer living together. His brother-in-law would come around to see his son but Mr Thien would not talk to him much as he always smelt of alcohol. Mr Thien was not aware of the divorce at that time but knew of the legal separation. On the second occasion when Mr Thien returned to Vietnam he again stayed with his sister and her son. He said that his brother-in-law returned sometimes to see the son. This was almost every week. He recalled him staying overnight on one occasion because he was too drunk to go home.

The account advanced by the applicant in that matter was that her daughter had divorced her husband but that the husband returned to the home to visit his son and on one occasion stayed overnight.

- 15 In its reasons for decision the Tribunal in *Tran* did not set out, or refer to, reg 1.15A and its discussion of the nature of the relationship between the daughter and her divorced husband was limited. This founded a submission made by the applicant, and the ultimate conclusion of Carr J, that the Tribunal had not addressed a relevant question. Both the submission and the conclusion are found in the following passages from his Honour's reasons:

The applicant submitted that it simply was not sufficient, as a matter of law, for the Tribunal to conclude as it did (in the passage set out above) that Ms Ton and Mr Truong "have had contact and are still in a continuous relationship together". The Tribunal should have gone on and asked the questions to which the Regulations required answers. In my opinion, the applicant's submission is correct. The same applies to the primary decision and the decision made upon review.

It may not have been necessary for the Tribunal to have set out in its reasons the text of Regulation 1.15A. However, given that it took the trouble to set out all the other regulatory requirements for this particular visa, that omission in itself has some significance. The primary decision-maker and, possibly, the review officer had some doubts about the legality of the divorce itself. The

Tribunal does not appear to have decided whether the divorce was a real one in law i.e. recognised by the appropriate court in Vietnam. But that is not the main point; that is very much a subsidiary point illustrating, as I think it does, an approach that was not as careful as it might have been. More seriously, even when categorising what it saw as the relationship between these two persons as being a continuous one, the Tribunal did not measure the evidence of that relationship against the regulatory requirements to which I have referred above. In my view, it simply did not ask itself the right questions. It is clear that when the genuineness of a claimed marriage or de facto relationship determines a person's entitlement either to enter or remain in Australia the tests to which I have just referred are (quite properly) rigorously applied - see Minister for Immigration, Local Government and Ethnic Affairs v Dhillon (Federal Court of Australia, Full Court, 8 May 1990 unreported) and Chand v Minister for Immigration and Multicultural Affairs (1996) 44 ALD 583. The same approach should be taken, when the existence of a mutual commitment to a shared life, a genuine and continuing relationship and the like, constitutes a disqualification.

One simply searches in vain for any evidence that Ms Ton and Mr Truong had at any relevant time a "mutual commitment to a shared life as husband and wife to the exclusion of all others". In my view, it was not sufficient to rely on a finding of absence of credibility on the part of the applicant and her son and a similar finding against Ms Ton at the primary and secondary levels of the decision-making process. The whole structure of that process rests on the statement from the O Mon Police Station that "... they are still living together at the same house". That, of course, falls far short of the definition found in the Regulations.
(emphasis added)

- 16 Counsel for the appellant submitted that, in the present case, as in *Tran*, the Tribunal did not measure the evidence of the relationship between the appellant and her ex-husband against the regulatory requirements found in reg 1.15A(2)(c) referred to at [12] above and the Federal Magistrate erred in failing to conclude that it had erred by not doing so.
- 17 The difficulty with this argument is that the account of the relationship with her ex-husband relied on by the appellant in support of her application was, in substance, that there was no contact between her and her ex-husband. That account, if it had been accepted, would not raise a question about whether they were in a relationship which had the characteristics identified in pars (i) and (ii) of reg 1.15A(2)(c) or whether they lived in one of the two ways identified in par (iii). However, the appellant's account was not accepted by the Tribunal and its rejection destroyed the foundation on which the application was advanced. In those circumstances it is not apparent to me that it was incumbent on the Tribunal to investigate questions concerning, for example, whether any relationship between the appellant and her

former husband was one in which they had, for example, a mutual commitment to a shared life as husband and wife to the exclusion of all others: see par (i) of reg 1.15A(2)(c).

18 Moreover, as the learned Federal Magistrate pointed out, it had been common ground that the appellant and her husband had once had a relationship which satisfied the definition of "spouse" in reg 1.15A and the issue the Tribunal needed to consider was whether it had ceased to be such a relationship. The appellant contended it had ceased because she and her ex-husband were no longer in contact. The rejection of this contention by the Tribunal permitted it to conclude that the relationship had not ceased to be a spousal relationship.

19 Lastly, counsel for the Minister is probably correct in submitting that because of the way reg 1.15A has been recast, it would have been incumbent upon the appellant to demonstrate to the satisfaction of the Minister that she and any spouse she might have, together had not more than three overseas near relatives: see reg 1.15(1)(d) and this would have required the appellant to establish that she did not have a spouse. However, this is not a matter on which it is necessary to express a concluded view, as the account relied on by the appellant, as noted in the two preceding paragraphs, was not accepted regardless of whether the appellant bore the burden of establishing she had a spouse. By rejecting the basis on which she said she did not, it was open to the Tribunal to conclude that she did.

20 The appeal should be dismissed with costs.

I certify that the preceding
twenty (20) numbered
paragraphs are a true copy of the
Reasons for Judgment herein of
the Honourable Justice Moore.

Associate:

Dated: 30 August 2005

Counsel for the Appellants: C Jackson

Solicitor for the Appellants: Birbas Attorneys

Counsel for the Respondent: GT Johnson

Solicitor for the Respondent: Sparke Helmore

Date of Hearing: 1 June 2005

Date of Judgment: 30 August 2005